No. 18-96

IN THE

Supreme Court of the United States

TENNESSEE WINE AND SPIRITS RETAILERS ASSOCIATION,

PETITIONER,

V.

ZACKARY W. BLAIR, ET AL.,

RESPONDENTS.

On Writ of Certiorari
To The United States Court of Appeals
For The Sixth Circuit

BRIEF AMICUS CURIAE OF ALAN B. MORRISON URGING AFFIRMANCE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF AMICI CURIAE 1

INTRODUCTION & SUMMARY OF ARGUMENT 1

ARGUMENT 4

THE JUDGMENT BELOW SHOULD ALSO BE AFFIRMED ON THE ALTERNATIVE BASIS OF THE PRIVILEGES & IMMUNITIES CLAUSE... 4

A. THE OPERATIVE FACTS. 4

B. PROCEDURAL OBJECTIONS TO DECIDING THE PRIVILEGES & IMMUNITIES ISSUE 6

C. THE RESIDENCE REQUIREMENT APPLICABLE TO OFFICERS, DIRECTORS, AND OWNERS OF RETAIL LIQUOR ESTABLISHMENTS VIOLATES THE PRIVILEGES & IMMUNITIES CLAUSE. 9

CONCLUSION 16

TABLE OF AUTHORITIES

Cases

44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996) 3, 14
Austin v. New Hampshire, 420 U.S. 656 (1975) .. 11
Baldwin v. Fish & Game Comm. of Montana, 436 U.S. 371 (1978) 10
Belleville Catering Co. v. Champaign Marketplace, LLC, 350 F.3d 691 (7th Cir. 2003) 7
Bernard v. Thorstenn, 489 U.S. 546 (1989) 1
Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984) 6
Craig v. Boren, 429 U.S. 190 (1976) 3, 14
Department of Revenue v. James B. Beam Distilling Co., 377 U.S. 341 (1964) 3, 14
Gordon v. Committee on Character and Fitness, 48 N.Y.2d 266, 397 N.E.2d 1309 (1979) 1, 13
Hicklin v. Orbeck, 437 U.S. 518 (1978) 11, 13
Hughes v. Oklahoma, 441 U.S. 332 (1979) 12
Louisville, C. & C. R. Co. v. Letson, 43 U.S. 497 (1844) 7
Maine v. Taylor, 477 U.S. 131 (1986) 12
McBurney v. Young, 569 U.S. 221 (2013) 10
Mullaney v. Anderson, 342 U.S. 415 (1952) .. 8, 9, 10
Paul v. Virginia, 75 U.S. (8 Wall) 168 (1868) 7
Philadelphia v. New Jersey, 437 U.S. 617 (1978) 12
Supreme Court of New Hampshire v. Piper, 470 U.S. 284 (1985) 1
Supreme Court of Virginia v. Friedman, 487 U.S. 59 (1988) 1, 3, 10

Toomer v. Whitsell, 334 U.S. 385 (1948) . 2, 9, 10, 11
United Building & Construction Trades Council v. Mayor & Council of the City of Camden, 465 U.S. 208 (1984) 3, 11
Ward v. Maryland, 79 U.S. (12 Wall.) 418 (1870) 3, 10

Constitution

Dormant Commerce Clause ..... passim
Equal Protection Clause 3, 14
Export-Import Clause 3, 14
First Amendment 3, 14
Privileges and Immunities Clause, Article IV, § 2 ..... passim
Twenty-first Amendment ..... passim

Statutes

28 U.S.C. § 1332(c) 7
Tenn. Code Ann, § 57-3-204(b) 4, 5, 12

INTEREST OF AMICI CURIAE[1]

Amicus curiae Alan B. Morrison is an associate dean at the George Washington University Law School where he teaches constitutional law. He is submitting this brief to provide the Court with an alternative basis for affirming the judgment below: the Privileges & Immunities Clause of Article IV, section 2 of the Constitution, which prohibits the precise discrimination against non-residents that is being challenged in this case. In addition to his teaching and writing on that Clause, amicus has also been co-counsel for parties or amici in a number of cases before this and other courts in which that Clause formed the basis of decisions setting aside residence requirements like those at issue here. *See e.g. Supreme Court of New Hampshire v. Piper*, 470 U.S. 284 (1985); *Supreme Court of Virginia v. Friedman*, 487 U.S. 59 (1988); *Bernard v. Thorstenn*, 489 U.S. 546 (1989); and *Gordon v. Committee on Character and Fitness*, 48 N.Y.2d 266, 397 N.E.2d 1309 (1979).

INTRODUCTION AND SUMMARY OF ARGUMENT

The Tennessee statute at issue in this case facially discriminates against non-residents who

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[1]This brief is filed pursuant to blanket consents provided by all parties. No person other than amicus has authored this brief in whole or in part or made a monetary contribution toward its preparation or submission.

wish to enter the retail liquor business by imposing a two-year Tennessee residence requirement on them. If the business were any other than liquor, there would be no doubt that the requirement was unconstitutional under the Dormant Commerce Clause, as the lower courts held, or under the Privileges and Immunities Clause of Article IV, section 2 of the Constitution, as respondent Tennessee Fine Wines and Spirits, d/b/a Total Wine Spirits Beer & More ("Total Wine") argued below.

Amicus agrees with Total Wine that the challenged statute is not saved by the Twenty-first Amendment, as petitioner and the State contend. This brief will focus instead on the alternative Privileges & Immunities Clause to strike down the Tennessee residence requirement. Under that Clause, "[t]he citizens of each state shall be entitled to all privileges and immunities of citizens in the several states," and it is undisputed that Total Wine is being denied the privilege of having a retail liquor license because its owners are citizens of Maryland and not Tennessee.[2]

Privileges & Immunities cases involving interstate discrimination frequently arise in the work context when non-residents seek to engage in a particular occupation, but are precluded from

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[2] Although the Clause speaks in terms of the rights of "citizens," this Court has made it clear that it applies to discriminations based on residence as well. *Toomer v. Witsell*, 334 U.S. 385, 397 (1948).

doing so or are penalized because they are non-residents in one of three ways. First, state laws, like the one at issue here, make non-residents categorically ineligible to obtain the required license, *Supreme Court of New Hampshire v. Piper*, 470 U.S. 284 (1984) (law), or make it more difficult to do so. *Supreme Court of Virginia v. Friedman*, 487 U.S. 59 (1988). In the second category are laws which impose license or other fees on non-residents that vastly exceed those charged to residents. *Ward v. Maryland*, 79 U.S. (12 Wall.) 418 (1870) (retail goods). The third category requires hiring preferences for residents. *United Building & Construction Trades Council v. Mayor & Council of the City of Camden*, 465 U.S. 208 (1984)(construction work). Thus, there can be no doubt that the Privileges & Immunities Clause has an expansive reach that would surely include the liquor industry.

Petitioner reads the Twenty-first Amendment in an expansive manner to preclude Total Wine's Dormant Commerce Clause challenge. But it does not dispute that the Amendment does not override other explicit protections in the Constitution, such as the Equal Protection Clause, *Craig v. Boren*, 429 U.S. 190 (1976), the First Amendment, *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996), or the Export-Import Clause in Article I, section 10, *Department of Revenue v. James B. Beam Distilling Co.*, 377 U.S. 341 (1964). Because the Privileges & Immunities Clause, like all these other provisions, contains an express protection, there is no basis to

conclude that the Twenty-first Amendment has any more impact on its operation in the Privileges & Immunities context than it does for these other constitutional protections.

ARGUMENT

THE JUDGMENT BELOW SHOULD ALSO BE AFFIRMED ON THE ALTERNATIVE BASIS OF THE PRIVILEGES & IMMUNITIES CLAUSE.

A. THE OPERATIVE FACTS.

This case arose when Clayton Byrd, then Executive Director of the Tennessee Alcoholic Beverage Commission, whose successor Zackary W. Blair is formally a respondent in this Court, filed a declaratory judgment action in a state court in Tennessee asking the court to decide whether the various residency requirements in Tenn. Code Ann, § 57-3-204(b) violated the Dormant Commerce Clause. The lawsuit named as defendants the two license applicants with non-resident owners – respondents Total Wine and Affluere Investments Inc. ("Affleure") – and the local association of retail liquor store owners, the petitioner Tennessee Wine and Spirits Retailers Association (the "Association"), which supports the constitutionality of these residence restrictions. The Association removed the case to federal court, and Total Wine responded, contending that the statute violated both the Dormant Commerce and the Privileges & Immunities Clauses.

At that time, section 57-3-204(b) contained three separate residence rules: (1) Any individual who wished to obtain a liquor license had to have resided in Tennessee for two years; (2) If the applicant were a corporation (or other legal entity), the officers, directors, and *all* of the shareholders had to satisfy the two-year residence requirement; and (3) to obtain renewal of the one-year license, all of the covered persons had to have been Tennessee residents for *ten* years.

In the district court, Total Wine argued that all three requirements were unconstitutional under both the Dormant Commerce and Privileges & Immunities Clauses. The district court agreed on Commerce Clause grounds and did not reach the alternative basis. In the court of appeals, Total Wine focused its arguments on the Commerce Clause, while expressly preserving the Privileges & Immunities Clause argument.

The majority in the Sixth Circuit struck down all three challenged provisions. Judge Sutton concurred with the ruling on the ten-year renewal provision and the 100% of shareholder requirement, but dissented on the basic two-year rule for both individual proprietors and for officers and directors of corporations and controlling shareholders of corporations and other business entities.

In this Court, petitioner argues that the Dormant Commerce Clause has no bearing at all on what states can do in terms of regulating the

three tiers of liquor distribution: production, wholesale, and retail. But despite that broad claim, it no longer seeks to defend the 10-year rule for renewals or the application of a two-year residence requirement for all of a company's shareholders, even though the sole basis on which they were set aside is the Dormant Commerce Clause.

B. PROCEDURAL OBJECTIONS TO DECIDING THE PRIVILEGES & IMMUNITIES ISSUE.

Petitioner and respondent Blair are likely to raise two procedural objections to this Court ruling on the Privileges & Immunities issue. Neither of them is a proper basis for declining to decide that issue.

First, the issue was not decided by either court below, although it was briefed in the district court and preserved on appeal. The case was decided on summary judgment, with no suggestion that there were any facts in dispute on either of the claims of unconstitutionality. Although this Court does not generally pass on questions not decided below, as the Court observed in another Twenty-first Amendment case, *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 697 (1984), "this rule is not inflexible, particularly in cases coming, as this one does, from the federal courts." The Court further observed that the barrier was less significant where the issue was raised in the pleadings and all relevant factual findings had been made. *Ibid.* And

if further briefing is needed, the Court can do what it did in *Capital Cities*: it can order the parties to brief the issue. *Ibid.*

Second, petitioner and the state argued in the lower courts that the Privileges & Immunities Clause applies only to "citizens," and because this Court held in *Paul v. Virginia*, 75 U.S. (8 Wall) 168 (1868), that citizens did not include corporations, the Clause does not protect Total Wine. Assuming that *Paul* is still good law, it does not eliminate the Privileges & Immunities objections to the residence law at issue here for at least two reasons.[3]

One, Total Wine is not a corporation, but rather was organized as a Tennessee LLC, and the federal courts have treated such entities differently because they are different. *Belleville Catering Co. v. Champaign Marketplace, LLC*, 350 F.3d 691, 692 (7th Cir. 2003). An LLC is comprised of members who are themselves citizens of a state, and so the formal "corporations are not citizens

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[3] If a case should arise in which the decision may turn on the applicability of the Privileges & Immunities Clause to corporations, this Court should re-visit *Paul*. In *Louisville, C. & C. R. Co. v. Letson*, 43 U.S. 497, 551 (1844), this Court rejected the proposition ""that a corporation in a state cannot be sued in the Circuit Courts of the United States, by a citizen of another state, unless all the members of the corporation are citizens of the state in which the suit is brought." Instead, it held that corporations can be "citizens" for diversity of citizenship purposes under Article III as they are today *See* 28 U.S.C. § 1332(c). Treating corporations as citizens under both constitutional provisions is entirely appropriate because the purpose of both is to protect non-residents from in-state biases.

because they cannot vote etc" objection does not apply to the members of an LLC or other artificial entities like partnerships and real estate investment trusts whose owners are citizens and stand in a different relation to the entity than do the shareholders of corporations.

Two, the discrimination here is directed at individuals who are citizens of states other than Tennessee and who, because they are denied the right to be owners of licenses for Tennessee retail liquor businesses, are directly injured by the Tennessee law at issue here. It is their personal right to own a Tennessee business that is at issue here, and the Privileges & Immunities Clause speaks directly to that claim and protects the rights of those individuals as citizens. When the state filed this action, it simply chose not to name the individual owners of Total Wine and the individual officers, directors, and shareholders of Affluere as defendants. But that decision does not eliminate the direct impact that the Tennessee law has on the rights of those individuals. Accordingly, it is entirely proper to decide this case on all of the grounds on which Total Wine has relied to protect its license application and the rights of its owners.

Furthermore, a similar objection to the standing of the respondents to raise a Privileges & Immunities claim was made in *Mullaney v. Anderson*, 342 U.S. 415 (1952). The respondents there were a union and its Secretary-Treasurer. They sought to represent individual union members who were non-residents of Alaska and who objected to the license fee that was ten times

as large for non-residents as for residents. To avoid having to decide the standing issue, the Court allowed respondents to amend the complaint to add two of their members as parties, *id.* at 416-17, and it then set aside the statute under the Privileges & Immunities Clause. Should the Court consider it necessary, that avenue is open here as well.

C. THE RESIDENCE REQUIREMENT APPLICABLE TO OFFICERS, DIRECTORS, AND OWNERS OF RETAIL LIQUOR ESTABLISHMENTS VIOLATES THE PRIVILEGES & IMMUNITIES CLAUSE.

The requirement that all officers, directors, and owners of retail liquor stores in Tennessee must have resided in the state for two years prior to the store receiving a license is a blatant form of discrimination against non-residents prohibited by the Privileges & Immunities Clause of Article IV, section 2 of the Constitution. Enacted as part of the original Constitution in 1787, this Clause "was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy." *Toomer v. Witsell*, 334 U.S. 385, 395 (1948).

The Clause does not operate to prevent states from making all distinctions between citizens and non-citizens in all areas of the law. Thus, the Court has recently upheld as outside the scope of the protections of the Clause the Virginia open records

statute that was available only for requests from its own citizens. *McBurney v. Young*, 569 U.S. 221 (2013). And the Court had previously rejected a claim of non-residents that the higher fees for big game licenses in Montana was a violation of that Clause. *Baldwin v. Fish & Game Comm. of Montana*, 436 U.S. 371 (1978). But the Court has never wavered in the application of the Clause to all forms of occupational restrictions based on residence.

Privileges & Immunities cases setting aside interstate discrimination regarding the opportunities for non-residents to engage in a lawful occupation on the same terms as residents arise in three different contexts. First are state laws, like those at issue in this case, totally precluding non-residents from obtaining a license to practice an occupation, most prominently the practice of law, *Supreme Court of New Hampshire v. Piper*, 470 U.S. 284 (1985), *Barnard v. Thorstenn*, 489 U.S. 546 (1989), or making it more difficult to obtain the license, *Supreme Court of Virginia v. Friedman*, 487 U.S. 59 (1988).

In the second category are laws which cover occupations such as selling goods at retail, *Ward v. Maryland*, 79 U.S. (12 Wall.) 418 (1870), shrimp fishing, *Toomer v. Witsell*, 334 U.S. 385 (1948), and commercial fishing, *Mullaney v. Anderson*, 342 U.S. 415 (1952), in which license fees for non-residents are many multiples of what residents are charged.

The third category, which requires hiring preferences for residents, has been applied in areas such as construction, *United Building & Construction Trades Council v. Mayor & Council of the City of Camden*, 465 U.S. 208 (1984), and the oil and gas industry, *Hicklin v. Orbeck*, 437 U.S. 518 (1978). *See also Austin v. New Hampshire*, 420 U.S. 656 (1975) (applying the Clause to overturn discriminatory income taxes for non-residents who work in the state). Thus, there can be no doubt that the Privileges & Immunities Clause has an expansive reach for those who seek to earn a living that would surely include the liquor industry.

There is another aspect of the Privileges & Immunities analysis, but it presents no obstacle to Total Wine in this case:

> Like many other constitutional provisions, the privileges and immunities clause is not an absolute. It does bar discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States. But it does not preclude disparity of treatment in the many situations where there are perfectly valid independent reasons for it.

Toomer, supra, 334 U.S. at 396. As the Court then explained that test, "the purpose of that clause, which, as indicated above, is to outlaw classifications based on the fact of non-citizenship unless there is something to indicate that non-citizens constitute a *peculiar source of the evil at*

which the statute is aimed." Id. at 398 (emphasis added).

In this case, petitioner, the state, and their amici suggest a number of reasons why the ban on non-resident officers, directors, and owners is justified, but there is not a shred of evidence in the record to support those claims. In the district court petitioner and the state chose to present no evidence that non-residents are the source of any demonstrable "evil," let alone a "peculiar" source of it. Instead they relied on the self-serving justifications that the Tennessee legislature added to section 57-3-204(b)(4) in 2014, two years after the Tennessee Attorney General had formally ruled that the residency requirements were unconstitutional.

Under the Dormant Commerce Clause, in cases in which there is facial or intentional discrimination, and not simply a claim of an undue burden on interstate commerce, this Court has almost never upheld state laws on the ground that a valid state purpose justified such differential treatment. *See Philadelphia v. New Jersey,* 437 U.S. 617, 624 (1978) (applying "virtual *per se* rule of invalidity" to "a law that overtly blocks the flow of interstate commerce at a State's borders"); *Hughes v. Oklahoma,* 441 U.S. 322 (1979) (rejecting conservation justification); *but see Maine v. Taylor,* 477 U.S. 131 (1986) (upholding similar stated justification on special facts). Given "the mutually reinforcing relationship between the Privileges and Immunities Clause of Art. IV, § 2, and the Commerce Clause – a relationship that

stems from their common origin in the Fourth Article of the Articles of Confederation, and their shared vision of federalism," this Court has concluded that it is appropriate to look to Commerce Clause decisions in ruling on Privileges & Immunities claims. *Hicklin v. Orbeck*, 437 U.S. 518, 531-32 (1978).

As respondent Total Wine explains in argument I B of its merits brief, the reasons offered by petitioner and its supporters to justify the ban on non-residents in the liquor business cannot support the law, under either the Privileges & Immunities or Dormant Commerce Clauses. There is no legitimate regulatory purpose that Tennessee seeks to accomplish for which there are not non-discriminatory means of achieving its goals. Indeed, many of these proffered justifications reprise those made in bar admission residency cases. Gordon v. Committee on Character and Fitness, 48 N.Y.2d 266, 274, 397 N.E.2d 1309, 1313 (1979) (rejecting justification based on "the need of Bar admission authorities to observe and evaluate the applicant's character").

The sole defense of Tennessee's residency requirements is that the Twenty-first Amendment gives the state a license to discriminate even if the discrimination otherwise violates the Constitution. Although some decisions have indicated that there are limited exceptions to the principles underlying the Dormant Commerce Clause based on that Amendment, no case has suggested that the Privileges & Immunities Clause is subject to a

similar limitation. Indeed, in the course of deciding what impact, if any, the Twenty-first Amendment has on other constitutional protections beyond the Commerce Clause, this Court has rejected every claim that its impact extends to other parts of the Constitution.

For example, in upholding the Equal Protection challenge involving gender discrimination in *Craig v. Boren*, 429 U.S. 190, 206 (1976), the Court stated that "[o]nce passing beyond consideration of the Commerce Clause, the relevance of the Twenty-first Amendment to other constitutional provisions becomes increasingly doubtful." And in a First Amendment challenge striking down Rhode Island's prohibitions on advertising the price of liquor sold at retail, the Court ruled that "the text of the Twenty-first Amendment supports the view that, while it grants the States authority over commerce that might otherwise be reserved to the Federal Government, it places no limit whatsoever on other constitutional provisions." *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 515 (1996). Furthermore, in *Department of Revenue v. James B. Beam Distilling Co.*, 377 U.S. 341, 344 (1964), the Court observed that it "has never so much as intimated that the Twenty-first Amendment has operated to permit what the Export-Import Clause precisely and explicitly forbids." Because the prohibition on interstate discrimination in the Privileges & Immunities Clause "precisely and explicitly forbids" what Tennessee has done here,

Total Wine's claim under that Clause is immune from attack based on the Twenty-first Amendment, no matter how that Amendment might impact a Dormant Commerce Clause claim.

Finally, petitioner has belatedly recognized that it cannot defend the provisions requiring ten-year residence to renew a license and the mandate that all owners of a corporation or similar business entity be Tennessee residents. But that recognition wholly undermines the argument made by petitioner and its amici that the Twenty-first Amendment eliminates all Dormant Commerce Clause challenges. If the Twenty-first Amendment argument had the potency that petitioner and its supporters claim, they would be defending the ten year and the 100% shareholder rules, rather than abandoning them and seeking to sever the officer, director, and owner rules.

There is no doubt why the defense of those now-abandoned rules could not be sustained, as even the dissenting Judge below found them to be wholly arbitrary and blatantly protectionist. But if, as petitioner claims, the Twenty-first Amendment precludes Dormant Commerce and Privileges & Immunities Clause challenges to the two-year residency rule for owners, officers, and directors, there is no principled reason why the deferential standard that petitioner proposes would not sustain the other even more protectionist rules as well. The only reasonable conclusion to be drawn is that the Twenty-first

Amendment does not authorize these kinds of discriminatory and protectionist laws in the liquor industry under the Privileges & Immunities Clause any more than it would in any other field of commerce.

CONCLUSION

For the foregoing reasons, the Court should affirm the decision below on the basis of both the Privileges & Immunities and the Dormant Commerce Clauses.

Respectfully Submitted,

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